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No. 04-108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SUSETTE KELO, *et al.*,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF AMICI CURIAE OF LAURA B. KOHR AND LEON P. HALLER, ESQUIRE, TRUSTEE, OWNERS OF LAUXMONT FARMS, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

WHETHER IN CONDEMNATION ACTIONS THE COURTS SHOULD VERIFY STATEMENTS BY LEGISLATIVE BODIES THAT A PARTICULAR USE OF THE CONDEMNED PROPERTY IS A "PUBLIC USE" IN ORDER TO GUARANTEE FEDERAL CONSTITUTIONAL RIGHTS OF THE PROPERTY OWNER.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of the Rules of this Court, Laura B. Kohr and Leon P. Haller, Esquire, Trustee as owners of Lauxmont Farms, respectfully submit this Brief Amici Curiae in support of petitioners.[1] This Brief is filed with the parties' written consent.

In 1973, Ronald C. and Laura B. Kohr ("Kohr Family") purchased about 1,400 acres of land in Lower Windsor Township, York County, Pennsylvania. The property was named Lauxmont Farms and it has been continuously used, in particular, to breed, raise and board horses. In 1989, the Kohr Family filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Ronald C. Kohr has since died. The Kohr Family Chapter 11 bankruptcy is now closed and unsecured creditors are being paid 100% of their claims pursuant to the confirmed plan of reorganization. The Kohr land – Lauxmont Farms – remains under the administration of Bankruptcy Trustee, Leon P. Haller. (For purposes of this Brief, Mr. Haller, as Bankruptcy Trustee, is also included within the definition of "Kohr Family.") Since 1973, the Kohr Family has sold some of their land and today the Kohr Family owns about 900 acres of land.

Lauxmont Farms is unusually beautiful. Located on the steep western shore of the Susquehanna River, it has a majestic overlook of the river that goes for miles. One small area of Lauxmont Farms contains archaeological remains of

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1. No party or counsel for a party to this case authored this Brief in whole or in part, and no person or entity other than amici curiae, its members, or its counsel has made a monetary contribution to the preparation or submission of this Brief.

an Indian village. The Farm has been used traditionally for breeding, raising and boarding horses. It also is used for the breeding of cattle. More recently the Kohr Family has transformed a portion of Lauxmont Farms into a reception center at which weddings and other functions take place. The Kohr Family has proposed developing approximately 300 acres of excess land at Lauxmont Farms (not including the archaeological site). As a result of this proposed development, the Kohr Family has applied for approval of its subdivision plans from the local Township authorities. The subdivided parcel would then be sold by the Trustee to fully implement the reorganization plan.

The response from York County has been to threaten to utilize state and federal "economic stimulus" funds to condemn a large portion of Lauxmont Farms and to turn that into a public park. The park would encompass 915 acres (including land owned by others). York County has not conducted any study to assess the need for an additional park. Instead, the Commonwealth of Pennsylvania has committed to funding the project with "economic stimulus" grants. Paradoxically, the so-called economic stimulus would have just the opposite effect, by taking land off of the tax roles, making the remainder useless for economically viable agricultural use and significantly reducing the value of the Kohr Family holdings. If permitted to proceed, the Kohr Family believes it will lose significant value based on the limited agricultural value of its land versus the developed value of its land. Furthermore, it believes that any review by a court of the "public use" alleged by the county government will be cursory at best under the current legal standard.

To further compound the situation, York County is contemplating condemning an 80-acre parcel formerly owned

by the Kohr Family known as "Highpoint" (which currently is owned by a developer named Peter Alecxih). It is believed that York County would rely again on "economic stimulus" grants from the Commonwealth to fund this land grab.

Because it is intensely interested in ensuring that any declaration of "public use" made by a condemning authority be subject to thorough judicial review and because it is a property owner whose land may be subject to a condemnation that claims there is a "public use" associated with the taking, the Kohr Family believes that its perspective will aid this Court in considering this case.

SUMMARY OF THE ARGUMENT

This Court has held that it is the obligation of the courts, in particular the Federal Courts, to protect the Federal Constitutional rights of individuals against governmental action. With respect to condemnations and takings, it is clear that the Federal Courts protect the property rights of individuals against the government. Regarding the Takings Clause, this Court said it most succinctly when it stated that "courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands."

The Supreme Court has recognized in a number of takings cases that "[t]he concepts of 'fairness and justice' . . . underlie the Takings Clause. . . ." "Fairness and justice" is one way of stating that the courts must review the actions of legislative bodies when they act under the Takings Clause. If the courts do not have this role, then "fairness and justice" is nothing more than a platitude. Given this Court's repeated statements that the Takings Clause is governed by "fairness and justice," and given that nothing in the cases remotely

implies that it is for the legislative or executive branches to decide that fairness and justice have been achieved, the only logical conclusion is that the courts decide when the legislature has acted in a manner consistent with fairness and justice.

This Court should acknowledge, as it has with cases under the Contract Clause, that blind deference to legislative determinations of public purpose is not always appropriate. As in cases where the state itself is a contracting party, the state has a significant self-interest which is at stake when the state is proposing to take non-blighted, economically viable and productive land for the purpose of economic development. In such cases, a less deferential standard of review ought to apply.

The *Berman* standard fails to adhere to the ordinary level of review for the protection of Constitutional rights. The *Berman* standard fails to adhere to the general level of review afforded for the protection of rights under the Takings Clause. The *Berman* standard is neither fair nor just and in this case, and others dealing with non-blighted property, the Court should revise that standard. Because *Kelo* relies extensively on *Berman*, this Court should reverse *Kelo*.

ARGUMENT

IN CONDEMNATION ACTIONS, THE COURTS SHOULD VERIFY STATEMENTS BY LEGISLATIVE BODIES THAT A PARTICULAR USE OF THE CONDEMNED PROPERTY IS A "PUBLIC USE" IN ORDER TO GUARANTEE THE FEDERAL CONSTITUTIONAL RIGHTS OF THE PROPERTY OWNER.

A. The Courts – not the Legislatures – are the Protectors of Federal Constitutional rights.

On numerous occasions this Court has held that it is the obligation of the courts, in particular the Federal Courts, to protect the Federal Constitutional rights of individuals against governmental action.[2] This is true not only in criminal or prisoner cases, but in all types of cases where administrative and regulatory actions were under scrutiny.[3] Justice Stevens

2. *Overton v. Bazzetta*, 539 U.S. 126, 138, 156 L. Ed. 2d 162, 174 (2003) (Stevens, J. concurring) ("[W]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."); *Johnson v. Avery*, 393 U.S. 483, 21 L. Ed. 2d 718 (1969) (protection of the constitutional rights of prisoners to petition the government for redress of grievances); *Lee v. Washington*, 390 U.S. 333, 19 L. Ed. 2d 1212 (1968) (protection of prisoners from invidious racial discrimination under the Equal Protection Clause of the Fourteenth Amendment).

3. *California v. Grace Brethren Church*, 457 U.S. 393, 417 n.37, 73 L. Ed. 2d 93, 112 n.37 (1982) (citing *Stone v. Powell*, 428 U.S. 465, 494 n.35, 49 L. Ed. 2d 1067, 1088 n.35 (1976)) (stating federal courts are constitutionally obligated to safeguard personal liberties and to uphold federal law); *Wolff v. McDonnell*, 418 U.S. 539, 557, (Cont'd)

perhaps said it best when he stated, "[i]n my opinion, the federal courts– and particularly this Court– have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267, 103 L. Ed. 2d 308, 320 (1989) (Stevens, J. concurring). Although the degree of scrutiny may vary from Constitutional right to right, it is clear that the courts, and primarily the Federal courts, have the obligation of protecting the Constitutional rights of citizens. It is recognized, however, that owing to the vast number of cases that are filed and the limited number of cases that physically could ~~be re~~viewed by the Supreme Court, this Court "rel[ies] primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. . . . Unfortunately, such review [that is faithful to the letter of the Constitution and cognizant of the principles underlying it] is not always forthcoming." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 499, 125 L. Ed. 2d 366, 406 (1993) (O'Connor, J., dissenting). Nevertheless, it is the responsibility of the Federal Courts, in particular, to guarantee the Federal Constitutional rights of citizens.

(Cont'd)

596, 41 L. Ed. 2d 935, 968, 974 (1974) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97, 3 L. Ed. 2d 1377, 1391 (1959)) (treating a person's liberty as equally protected, even when the liberty itself is a statutory creation of the state, and holding that the touchstone of due process is protection of the individual against arbitrary government action); *Dent v. West Virginia*, 129 U.S. 114, 124, 32 L. Ed. 623, 626 (1889) (the definition of due process of law includes securing a citizen against arbitrary legislative power); *see Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 98 L. Ed. 873 (1954) (protection of equal educational rights of minority children).

With respect to condemnations and takings, it is clear that the Federal Courts protect the property rights of individuals against the government. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327, 37 L. Ed. 463, 468 (1893)

> The legislature may determine what private property is needed for public purposes – that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327, 37 L. Ed. at 468; *see First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9, 96 L. Ed. 2d 250, 264 n.9 (1987) ("[I]t is the Constitution that dictates the remedy [of judicial review] for interference with property rights amounting to a taking."); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 151, 57 L. Ed. 2d 631, 665 (1978) (Rehnquist, J. dissenting) (ascertainment of the amount that constitutes just compensation is a judicial inquiry); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 67 L. Ed. 664, 669 (1923) ("[A]scertainment [of just compensation] is a judicial function."); *see also Bush v. Gore*, 531 U.S. 98, 115 n.1, 148 L. Ed. 2d 388, 405 n.1 (2000) (Rehnquist, C.J., concurring)

> [O]ur jurisprudence requires us to analyze the "background principles" of state property law to

> determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

Id. at 115 n.1, 148 L. Ed. 2d at 405 n.1. Thus, it is clear that the Fifth Amendment requires that the courts – and not the legislature – ultimately make the determination of the amount of compensation that will be awarded under a condemnation. With respect to compliance with the Takings Clause (and perhaps all other Constitutional rights), this Court said it most succinctly when it stated that "courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands." *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 151 n.39, 42 L. Ed. 2d 320, 358 n.39 (1974). The reason for this particular protection of property rights, as one court has recently called it, is these rights are one of the "bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property." *County of Wayne v. Hathcock*, 471 Mich. 445, 450, 684 N.W.2d 765, 769 (2004).

The Takings Clause is a mere twelve words: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This Court has repeatedly held that "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314, 96 L. Ed. 2d at 263; *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 143-44 (1985); *Hodel v. Virginia Surface Mining &*

Reclamation Assn., 452 U.S. 264, 297 n.40, 69 L. Ed. 2d 1, 29 n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104, 76 L. Ed. 637, 642-43 (1932); *Monongahela Nav. Co.*, 148 U.S. at 336, 37 L. Ed. at 471; *United States v. Jones*, 109 U.S. 513, 518, 27 L. Ed. 1015, 1017 (1883). While this Court has explicitly insisted that the courts determine what constitutes "just compensation," it nevertheless has deferred to the legislature when determining what constitutes a "public use." *Berman v. Parker*, 348 U.S. 26, 32, 99 L. Ed. 27, 37 (1954) (citations omitted)

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.

Id. at 32, 99 L. Ed. at 37. Thus in the space of the few words of the Takings Clause, the Court has parsed the clause to determine that both the courts are the guardians of the Constitutional right to just compensation, and that it is the legislature that determines whether a use constitutes a public use.

The Court's self-imposed dichotomy and parsing of the Takings Clause admits of no consistency. Nothing in the clause indicates why one determination is almost exclusively for the courts, yet the other is almost exclusively for the legislature. Commentators from across the political spectrum have had a field day due to the inconsistency that is apparent from this dual system of review. *Compare* Gideon Kanner, *Developments in the Right-To-Take Law: Is the End of the*

Redevelopment Scam Coming?, Eminent Domain and Land Valuation Litigation, ALI-ABA Course of Study Materials SG059, American Law Institute at 25 (Jan. 2002)

> Thus, the courts have evolved a Catch-22 system. First they provide incentives to reckless exercise of the eminent domain power by their extreme *laissez faire* attitude when it comes to reviewing whether the taking is consistent with the "public use" constitutional limitation and the statutory authorization to condemn. They also assert that when it comes to fixing minimal standards of "just compensation," they are supreme.

Id. at 25; *with* Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207, 208 (2004) (footnotes omitted) ("The courts have come to interpret the 'public use' requirement in a way that renders it meaningless, essentially giving governments carte blanche to take property for any reason whatsoever, including crass political purposes or speculative, transient economic purposes."); *see* Jennifer J. Kruckeberg, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 Minn. L. Rev. 543, 582 (2002) ("The modern treatment of the public use requirement badly needs reform.").

While it is entirely consistent with the jurisprudence of this Court for courts to be designated as the arbiter of the question of Just Compensation, it is completely inconsistent for the courts to abdicate that responsibility on the question of Public Use.

B. Because the Concepts of "Fairness and Justice" Underlie the Takings Clause, Those Concepts Should Guide the Court in Determining Whether a So-Called "Public Use" is Consistent with Federal Constitutional Rights.

The Supreme Court has recognized in a number of takings cases that "the concepts of 'fairness and justice' . . . underlie the Takings Clause. . . ." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336, 152 L. Ed. 2d 517, 548 (2002); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 633, 150 L. Ed. 2d 592, 617 (2001) (O'Connor, J., concurring); *see also Penn Central*, 438 U.S. at 123-24, 57 L. Ed. 2d at 648; *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 1561 (1960). Although *Tahoe-Sierra* dealt with another aspect of the Takings Clause, namely a regulatory taking, that does not diminish the principle stated by this Court that "the concepts of fairness and justice underlie the Takings Clause." Indeed, it is axiomatic that the concepts of fairness and justice should govern all aspects of review of all claims under the Takings Clause. Certainly nothing in the Takings Clause or in this Court's jurisprudence would suggest that "fairness and justice" ought to apply in some cases under the Takings Clause, yet some other standard should underlie other cases under the same clause.

As the Court identified in *Penn Central*, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124, 57 L. Ed. 2d at 648. The Court ruled that in making a determination of "whether a particular restriction will be rendered invalid by

the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id.* (citations omitted). The Court recognized that the determination that must be made is an "essentially ad hoc, factual inquir[y]." *Id.* With respect to regulatory takings, the Court recently has endorsed the requirement of "'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S. at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 533 U.S. at 636. (O'CONNOR, J., concurring)." *Tahoe-Sierra*, 535 U.S. at 322, 152 L. Ed. 2d at 540. Thus, "fairness and justice" is one way of stating that the courts must review the actions of legislative bodies when they act under the Takings Clause. If the courts do not have this role, then "fairness and justice" is nothing more than a platitude.

While the Court in *Tahoe-Sierra* acknowledged significant differences between condemnations and physical takings (with respect to which the Court stated that the Court's jurisprudence was "as old as the Republic") and regulatory takings, once again, nothing in the Clause admits to anything less than the "fairness and justice" standard for review for all cases under the Takings Clause. *Id.* One area of the Court's jurisprudence that is not "as old as the Republic" in condemnations cases is the question of the level of review of a legislative determination of a "public use" under the Takings Clause. Fifty years ago, in *Berman v. Parker*, the Court set out a new standard of almost complete deference to the legislature in which the legislative determination of "public use" is "well-nigh conclusive." 348 U.S. at 32, 99 L. Ed. at 37. In such cases, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."

Id. Subsequently, the Court further elucidated the role of the courts in reviewing "public use" determinations:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, . . . which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, . . . which emphasized that "[any] departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-42, 81 L. Ed. 2d 186, 197 (1984) (citations omitted).

This Court has recognized that the courts play the preeminent role in determining whether a legislature has properly determined that a use is consistent with the Constitution. That role is limited to a determination of

whether the taking "is rationally related to a conceivable public purpose." *Id.* at 240-41, 81 L. Ed. 2d at 198. In a subsequent condemnation case, this Court has asserted that the condemnation power is constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23, 118 L. Ed. 2d 52, 69 (1992). In *National Railroad Passenger Corp.*, the Court examined a statutory condemnation scheme that transferred 48.8 miles of tract from one privately owned railroad company to another. The Court made a superficial examination (that is to say, it did not make "a specific factual determination" *Id.*) of whether the ICC was "irrational" in determining that the condemnation at issue would serve a public purpose and determined that it did serve a public purpose. On that basis, the Court held that this cursory review "suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objectives." *Id.*

In a regulatory takings case, a plurality of this Court directly equated the justice and fairness requirement as requiring a review, presumably by a court, of governmental action:

> Government regulation often "curtails some potential for the use or economic exploitation of private property," . . . and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," . . . In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental

> action. . . That inquiry, by its nature, does not lend itself to any set formula, . . . and the determination whether 'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive.

Eastern Enterprises v. Apfel, 524 U.S. 498, 523, 141 L. Ed. 2d 451, 470-71 (1998) (citations omitted) (per O'Connor, J.).

In a somewhat earlier case, the Court again intimated that the courts determined when a governmental action that resulted in a take was fair and just:

> The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" [*Penn Central*, 438 U.S. at 124]; *see Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. *See Penn Central, supra*, at 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

Andrus v. Allard, 444 U.S. 51, 65, 62 L. Ed. 2d 210, 222 (1979). Given this Court's repeated statements that the Takings Clause is governed by "justice and fairness," and given that nothing in the cases remotely implies that it is for

the legislative or executive branches to decide that justice and fairness have been achieved, the only logical conclusion is that the courts decide when the legislature has acted in a manner consistent with justice and fairness.

It is hard, if not impossible, to justify the minimal review afforded by the Court of the constitutionality of whether a use is a "public use" when one compares that to the significant level of review afforded of whether compensation is "just compensation" – let alone the level of review provided by the courts in the protection of other fundamental constitutional rights. Unfortunately, the role currently allowed by the Court to examine the constitutionality of public use determinations is so narrow as to constitute virtually no role. How can this negligible role square with the concepts of fairness and justice? It cannot.

The Federal Courts cannot abdicate the important role of reviewing the actions of the states whenever important Federal constitutional rights are at stake. In order to guarantee that fairness and justice play a role in all cases under the Takings Clause – as the Court has stated on many occasions – then it is logical that the Court should allow a thorough judicial review of the legislative body's determination that a use meets the constitutional requirements for a public use. That is not to say that the courts should make "public use determinations," only that the courts ought to carefully review the legislative determination to insure that it meets the requirements of the Federal Constitution. The only way that the courts can ensure that there has been fairness and justice, is for the courts to play an active role in reviewing the determinations of the state legislatures.

C. This Court Should Apply Reduced Deference to Determinations of "Public Use" Consistent With the Test Applied Under the Contract Clause to Takings of Non-Blighted Property.

To achieve fairness and justice when a court is reviewing a taking of a non-blighted property by the exercise of eminent domain for economic development, a reduced standard of deference should be applied by the courts to the review of any legislative determination that the taking is for a public use and in the public interest. The exercise of police power and of eminent domain has an outer limit, though the Court has observed that the fact sensitive nature of such cases make it "fruitless" to attempt to define that limit. *Berman*, 348 U.S. at 32, 99 L. Ed. at 37. Nonetheless, the Court should acknowledge, as it has with cases under the Contract Clause, U.S. Const. art. I, § 10, cl. 1, that blind deference to legislative determinations of public purpose are not always appropriate.

Under the Contract Clause, this Court has held, "[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[4] A different standard applies, however, when the sovereign is itself a contracting party:

> When the State is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."

4. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13, 74 L. Ed. 2d 569, 581 (1983), quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 52 L. Ed. 2d 92, 110 (1977).

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 n.14, 74 L. Ed. 2d 569, 581 n.14 (1983), citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 52 L. Ed. 2d 92, 112 (1977). As in cases where the state itself is a contracting party, the state has a significant economic self-interest which is at stake when the state is proposing to take non-blighted, economically viable and productive land for the purpose of economic development. Under this circumstance a less deferential standard of review ought to apply.

In *Berman*, the Court essentially declined to exercise any analysis of the taking at issue, stating that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman*, 348 U.S. at 32, 99 L. Ed. at 37. Such complete deference to legislative determinations involving non-blighted properties must end. In *Berman*, the one property at issue was not blighted, but was in an area to be condemned in which the majority of properties were "beyond repair"[5] and the character of the area was such that the Court commented that:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men

5. *Berman v. Parker*, 348 U.S. 26, 30, 99 L. Ed. 27, 36 (1954).

> turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Id. That case was decided in 1954, at the vanguard of the movement to redevelop blighted property in order to create clean, safe public housing.

Today, the interests of the state in taking of non-blighted property for economic development are not, in the main, in preventing the spread of "disease, crime and immorality," but in increasing the tax base and providing jobs, as in *Kelo*, or in preserving the aesthetics of an area for tourism, as in Lauxmont Farms. The interests of the state in takings like the one at issue in *Kelo* and the threatened taking of Lauxmont Farms are more analogous to those in Contract Clause cases, where the interest of the state is purely financial. The more stringent standard of review applied in such cases under the Contract Clause was first articulated in *United States Trust Co.*, 431 U.S. at 26 n.25, 52 L. Ed. 2d at 112 n.25, which harkened back to the cases involving the federal abrogation of gold clauses in 1935 in which the Court drew a distinction and applied a dual standard of review:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

Perry v. United States, 294 U.S. 330, 350-351, 79 L. Ed. 912, 917 (1935).

Similarly, there is a clear distinction between the taking of property for economic or other development which is blighted, an "ugly sore" suffocating the spirit and "reducing the people who live there to the status of cattle,"[6] and the taking of property comprised of middle class neighborhoods with proud property owners who happen to be in the path of desirable developable land along waterfront targeted for upscale redevelopment, as in *Kelo*, or valuable farm land surrounded by ten acre mini-farmettes with mini-mansions targeted for a tourist attraction as in the case of Lauxmont Farms.

A reduced standard of deference, similar to that owed to the state in Contract Clause cases in which the state is a party should be applied to takings of non-blighted property for economic development. The test under the Contract Clause is whether the law or regulation at issue has in fact "operated as a substantial impairment of a contractual relationship"; if so, whether the state has a "significant and legitimate public purpose" behind the law or regulation; and finally, if there is a significant and legitimate public purpose, whether the "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Energy Reserves*, 459 U.S. at 411-412, 74 L. Ed. 2d at 581 (internal quotation marks and citations omitted).

The test that should be applied in the takings context should be first for the court to determine whether the property to be taken is blighted. If the court determines the property is not blighted, then it ought to decide whether the proposed

6. *Id.* at 32, 99 L. Ed. at 37.

economic development or other justification for the taking amounts to a significant and legitimate *public* purpose. Finally, if the court determines that there is a significant and legitimate public purpose, it should then decide whether the scope of the taking is appropriate (i.e., whether the taking is or ought to be an easement, fee, or some other interest in land). By utilizing a less-deferential standard, the Court will reasonably protect the constitutional rights of property owners. Such a test would infuse "fairness and justice" into a system in which this standard has been lacking for fifty years.

D. *Berman* (and its Progeny) and *Kelo* Unnecessarily Defer to the Legislature for Determining Whether a "Public Use" Determination is Constitutional.

Since *Berman v. Parker*, the U.S. Supreme Court has deferred to the statements of the legislature regarding whether or not a particular use constitutes a public use. *Berman* and its progeny, including *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), show unnecessary deference to the legislature in determining that a condemnation constitutes a public use.

The Connecticut Supreme Court in *Kelo* reviewed with approval the language of *Berman* and *Midkiff*, and agreed that the court should provide the most deferential review of the City of New London's determination that the proposed use was a "public use." *Kelo*, 268 Conn. at 36-38, 843 A.2d at 525-26. The *Kelo* court, referring to state cases in addition to *Berman* and *Midkiff*, held that "[b]oth federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial

deference to the legislative determination of purpose."[7] On the basis of the (primarily) federal authority requiring only limited review of the legislative determination, the court found that the economic development asserted by the city and a private redevelopment corporation as the "public use determination" justifying the condemnation, "constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions." *Kelo*, 268 Conn. at 40, 843 A.2d at 528.

Nothing in *Kelo* indicates that the properties that were condemned by the city and the private redevelopment corporation were blighted. *See id.* at 5-11, 843 A.2d at 507-11. As the *Kelo* court itself stated, quoting the trial court, "each of the plaintiffs testified and said they wished to remain in their homes for a variety of personal reasons." *Id.* at 11; 843 A.2d at 511. These reasons included that they and their families had lived in their homes for decades, they

7. The court's reference to the legislative statement of purpose and motive call to mind this Court's admonition:

> In [the dissent's] view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, *the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.* We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12, 120 L. Ed. 2d 798, 819 n.12 (1992) (emphasis added) (citation omitted).

"loved their homes," and other strongly personal reasons. *Id.* The real reason for the condemnation was set out by the court in the opening sentence of its opinion and expressed fairly clearly the issue it was seeking to resolve:

> The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

Id. at 5, 843 A.2d at 507.

The *Kelo* dissent (in a 4-3 decision), authored by Justice Peter T. Zarella, acknowledged that the requirement of "judicial deference to determinations of public use by state legislatures is appropriate." *Id.* at 134, 843 A.2d at 581 (Zarella, J., dissenting). Nevertheless, the dissent advocated that "judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility." *Id.* at 134-35, 843 A.2d at 582. The dissent urged that "the taking of nonblighted property in a blighted area is subject to additional scrutiny to determine whether the taking is 'essential' to the redevelopment plan." *Id.* at 143, 843 A.2d at 587. Furthermore, "a heightened standard of judicial review [should] be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for the purpose of private economic development." *Id.* The dissent took a strong position that the record was lacking in support of the

taking of the plaintiffs' properties and would have held the takings unconstitutional. *Id.* at 268, 843 A.2d at 600.

The court in *Kelo* permitted a condemnation of private property, in part, by a private redevelopment corporation, that will benefit one set of private individuals and which takes away private property from other private individuals without significantly reviewing the determination that the use was a "public use." The court merely defaults to the *Berman* standard regarding whether a sufficient public purpose has been stated, saying it will "give substantial deference to the legislative determination of purpose." *Id.* at 40, 843 A.2d at 527-28. The *Berman* standard fails to adhere to the ordinary level of review for the protection of Constitutional rights. The *Berman* standard fails to adhere to the general level of review afforded for the protection of rights under the Takings Clause. The *Berman* standard is neither fair nor just. By limiting the review of "public use" determinations, essentially, to the language contained in the preamble of a condemnation or statute, this Court denies the kind of review that ought to exist for this "bedrock principle[] of our legal tradition: the sacrosanct right of individuals to dominion over their private property." *County of Wayne*, 471 Mich. at 450, 684 N.W.2d at 769.

CONCLUSION

The judgment of the Supreme Court of Connecticut should be reversed.

Respectfully submitted,

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